United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-2062

To Be Argued By
ALBERT MINTZER
Petitioner-Appellant
Pro Se

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

- x

In The Matter of the Application

-of-

ALBERT MINTZER,

Petitioner-Appellant,

For A Writ of Habeas Corpus

-against-

STATE OF NEW YORK,

Respondent-Appellee,

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,

Respondent.

- x

FILE NO.

75-2062

Southern District
COURT INDEX NO.

66 Civ.724

BRIEF AND APPENDIX OF PETITIONER-APPELLANT

ALBERT MINTZER
Petitioner-Appellant Pro Se
242 West 38th Street
New York City, 10018
Telephones: Ch4-5958
Ch4-5471

INDEX

Table of Authorities

Federal

State (New York)

Page

Amendments To The Constitution of The United States

New York State Statutes

ISSUES PRESENTED FOR REVIEW

First

A substantial part of the state Supreme Court trial, which consumed about 18 days, was devoted to evidence, adduced by the prosecution, in support of count 2 of the indictment. This count charged petitioner with conversion of trust funds, under section 1302 of the New York State Penal Law. The state trial was before Hon. Irving H. Saypol, J.

On the People's case and on the whole case, petitioner moved to dismiss said count upon the grounds of failure of proof and evidence insufficiency. His motions were denied after extended colloquy.

After the jury had been infected with a mass of evidence in support of said count, and after the prosecution had delivered an inflammatory summation to the jury, most of which was devoted to the evidence in support of said count 2, the trial judge, in his charge to the jury, withdrew said count from its consideration without any prior notice to petitioner that the trial judge intended so to do.

The jury found petitioner guilty of the felony of larceny by false pretense, charged in count 3 of the indictment, and the misdemeanor of failure to file an annual report of real estate syndicate operations, charged in count 5.

Petitioner was sentenced to five to ten years imprisonment, on his felony conviction, and a suspended sentence of one year on his misdemeanor conviction.

On this aspect of the state trial record, petitioner presents the following issues for review:

(a). That the denial to petitioner of habeas corpus relief, by Hon. Murry J. Gurfein, the learned district judge below, upon the ground that petitioner did not show prejudice resulting from the conduct of the trial judge, as aforesaid, was erroneous, as a matter of constitutional law;

(b). That the circumstances under which count 2 was withdrawn by the trial judge, during his charge to the jury, are of a kind which must be presumed, as a matter of law, to have prejudiced petitioner;

(c). That the minds of the jury were so contaminated with the evidence adduced in support of said count 2, and the prosecution's summation with respect thereto, with the result that the jury rendered its verdict of guilt on counts 3 and 5;

(d). That, as a consequence, petitioner's state court ~~of~~ conviction is a nullity and void in that he was denied a fair trial and due process, as guaranteed t him by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Statement of The Case

This appeal, in habeas corpus proceedings, is in this Court under a certificate of probable cause granted by Hon. Murry J. Gurfein, as district judge.

The certificate is included in the memorandum order of Judge Gurfein, dated August 15,1972 (A11), which amended his memorandum order, dated August 7,1972(A7), wherein, on reargument, Judge Gurfein passed upon new matter which he had not adjudicated upon in his original memorandum order, dated June 13, 1972(A1), because of an inadvertent erroneous admission of petitioner that he had not raised it in the state courts when, as a matter of fact, it had been the subject matter of a state court habeas proceeding, as found by Judge Gurfein in his aforementioned reargument order, dated August 7th.

This is the second habeas corpus proceeding that petitioner has brought to this Court for review. The first one was denied by Hon. Frederick VanPelt Bryan, district judge, by unreported memorandum order, dated May 15,1967; affirmed by this Court on November 30, 1967 (Waterman, Moore and Hays, JJ), (United States ex rel Mintzer v. Dros, 403 F.2d 42); cert denied, 390 U.S.1044(1968)

The instant habeas proceeding, passed upon by Judge Gurfein, at a time when petitioner was at liberty on parole, was found to involve new matter not raised in the habeas proceeding denied by Judge Bryan and affirmed by this Court, at

times during petitioner's imprisonment.

The history of the extensive judicial proceedings pursued by petitioner to review his state court conviction and the circumstances under which Judge Gurfein was assigned to pass upon this habeas proceeding, are fully set forth in his original memorandum order, dated June 13, 1972 (A1).

The new matter, which is the thrust of this appeal, was stated in the order of Judge Gurfein, dated August 7, 1972 (A8) as follows:

> "The claim in question is that (petitioner's) conviction of grand larceny by false pretenses was offensive to due process because the overwhelming bulk of the evidence at trial was introduced in support of a count alleging conversion of trust funds (and the prosecutor delivered an inflammatory summation with respect to that count), while that count was ultimately withdrawn by the trial court from the jury's consideration. It is alleged that the count was withdrawn during the charge to the jury, even though earlier motions by the defendant to dismiss that count had been denied".

Judge Gurfein "dismissed" this claim on the ground:

> "While on occasion prejudice may result from such practice, there is nothing in the record before me to suggest that the trial judge's power was abused or that there was any denial of fundamental fairness in Mintzer's case" (Citations of authorities omitted).

It is the thrust of this appeal that this ruling by Judge Gurfein in erroneous, as a matter of law and fact, and the authorities cited in support thereof are inapposite.

As detailed in his "Issues To Be Presented For Review", supra, petitioner claims that not only has he demonstrated prejudice but, also, that the circumstances under which the learned state trial judge (Hon. Irving J. Saypol,J.) withdrew the conversion of trust funds count 2 from the jury, during his charge, are of a kind which must be presumed, as a matter of law, to have prejudiced petitioner and denied him fundamental fairness.

This is established by the state court record, on only casual inspection.

By judgment, dated July 13, 1964, peitioner was convicted, after trial before a jury which consumed about 18 days in the state Supreme Court, New York County (Saypol, J.), of the felony crime of Grand Larceny, First Degree, by False Pretense, of the sum of $35,700 from named public investors, and the misdemeanor crime of Failing to File an Annual Report of Real Estate Syndication. The felony larceny conviction is based upon Penal Law, Section 1290. The misdemeanor crime is based upon General Business Law, Section 352-e-8.

Petitioner was sentenced to imprisonment for a term of 5 to 10 years on his felony conviction and sentence of one year, suspended, was imposed on his misdemeanor conviction.

In addition, petitioner was disbarred from the practise of law to which he was admitted, during the year 1930,at a term of the Appellate Division of the State of New York, First Department.

This state court prosecution had its genesis in a public offering of securities to finance the acquisition of title to an income producing business building known as 110-112 East 30th Street, New York City.

The securities were qualified for public distribution, on an intra-state basis, under Article 23A of the General Business Law of the State of New York, with particular reference to Section 352-e thereof, entitled "Real Estate Syndication Offerings," and its companion sections, which were added thereto by Chapter 987 of the 1960 Session Laws of New York which took effect on January 1st, 1961.

Said offering was made under a 20 page printed offering circular, dated March 6th,1961, which had been duly qualified for public distribution, as aforesaid.

Petitioner was tried on a five count indictment. His prosecutor was Hon. Louis J. Lefkowitz, Attorney General of the State of New York.

The first count charged petitioner with common law larceny of $32,641.73,in violation of Section 1290 of the Penal Law, from named complainants. After all the evidence was in, this count was dismissed on motion of the prosecutor.

The second count charged the petitioner with grand larceny of trust funds, as trustee under a written instrument, in violation of Section 1302 of the Penal Law, from named complainants. The circumstances under which this count was removed from the consideration of the jury during the trial

judge's charge will be fully detailed infra. It is this disposition of said count that petitioner contends deprived him of a fair trial and denied him fundamental fairness.

The third count, and this is the only larceny count that was given to the jury, and on which petitioner was convicted of a felony, charged grand larceny by false pretense of $35,700 from named complainants, in violation of Section 1290 of the Penal Law.

The fourth count charged petitioner with commingling and withdrawing trust funds of $74,375 (out of the $87,500 collected from subscribers) in violation of Section 352-h of the General Business Laws. The circumstances which resulted in this count being dismissed on motion of the prosecutor will be discussed infra.

Count five, of which petitioner was convicted, charged him with the misdemeanor of failing to file an annual report of real estate syndicate operations, in violation of General Business Law, Sections 352-8 and 359-g.

Footnote 2 of the original memorandum order of Judge Gurfein, dated June 13, 1972, states (A5):

> "The Court now has before it the original petition and trial transcript; the state's responding papers dated May 10,1972; and letters with enclosures, from Mintzer dated April 25, May 1 and May 16,1972".

Included in the record below, is petitioner's motion to amend his original petition, dated March 14, 1966, which amendment included, among other things, new matter upon which

he sought habeas relief. Judge Gurfein granted said amendment application, as appears in footnote 6 of his said order of June 13, 1972 wherein it is stated(A6):

> "In his recent letters to the Court, see note 2, supra, he (petitioner) seeks to amend his petition in various ways. In view of the amount of time which has expired since his petition was filed and in light of the Court's desire to consider any valid claim, the Court grants leave to amend the original petition as requested in those letters.
>
> . . . . . ."

Also included in the record below, is petitioner's 79 page brief in the state Court of Appeals which was submitted to and accepted by Judge Gurfein to assist him in his examination of the voluminous state trial record.

Copies of said state Court of Appeals brief will be submitted to this Honorable Court together with petitioner's brief and appendix.

Petitioner believes that said state Court of Appeals brief correctly summarizes the state trial record and exhibits which are quite voluminous. He respectfully prays that it be incorporated, by reference, in his brief to this Honorable Court so as to avoid duplication therein.

The state court trial transcript will hereinafter be referred to by the letters "tt".

A R G U M E N T

Point One

THE DENIAL OF HABEAS RELIEF UPON THE GROUND THAT PETITIONER DID NOT SHOW PREJUDICE RESULTING FROM THE WITHDRAWAL OF COUNT 2 FROM THE JURY DURING THE STATE TRIAL JUDGE'S CHARGE TO THE JURY WAS ERRONEOUS, AS A MATTER CONSTITUTIONAL LAW

THE CIRCUMSTANCES SURROUNDING THE WITHDRAWAL OF COUNT 2, AS AFORESAID, ARE OF A KIND WHICH MUST BE PRESUMED, AS A MATTER OF LAW, TO HAVE PREJUDICED PEITIONER AND DENIED HIM A FAIR TRIAL

Count 2 of the indictment charged petitioner, in substance, as follows:

> "AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said defendant, ALBERT MINTZER, of the crime of GRAND LARCENY IN THE FIRST DEGREE in violation of (section) 1302 of the Penal Law of the State of New York, committed as follows;
>
> That the said defendant, ALBERT MINTZER, between on or about April 20, 1961 and December 31, 1962, while acting as a trustee appointed by an instrument, and with the intent to deprive and defraud others of property and of the use and benefit thereof, secreted, withheld or otherwise appropriated to his own use or to the use of someone other than the true owners and persons entitled thereto, property from (138 named complainants) having an aggregate value of $32,641.73 in lawful currency of the United States of America, said monies being in his possess and custody by virtue of his office and appointment.

A substantial part of the state court trial was devoted to testimony and exhibits adduced in support of count 2.

During the trial and until the charge to the jury, the parties and the trial judge were under the impression that the principal crime charged was larceny by a trustee, appointed under a written instrument, charged in count 2 under Section 1302 of the Penal Law.

The trial judge stated, in colloquy after the close of the evidence and before summation (1443), "By the same token, the major count, as I see it, is 1302, and that is mishandling trust funds ....."

Petitioner's prosecutor, on his motion to withdraw the fourth count of the indictment charging commingling and withdrawing monies ($74,375.00) held in trust, stated (1498-9):

> "I recognize section 1302 of the Penal Law is the major crime charged in this indictment . . . .having an interrelationship with Section 1302, People respectfully withdraw the fourth count of the indictment".

Petitioner repeatedly and aggressively moved, at many stages of the trial, particularly at the close of Peoples case and the whole case, to dismiss this count 2, on the authority of People v. Dalsis, (2 App. Div. 2d 34) which held that the corporate veil could not be pierced to make an officer of a corporate trustee, a trustee in his individual capacity. In support of this contention, petitioner submitted to Judge Saypol (1176) reproduced copies of the indictment, briefs, appellant and respondent, upon which this Appellate Division

decision was rendered in the Dalsis case (tt927,974,1131-1136, et seq., 1139, 1147-1151, 1248, 1443, 1472-80(a), 1499).

All to no avail. Petitioner's motions to dismiss count 2, on which the prosecution saturated the trial, were all denied.

During colloquy on the requests to charge, submitted in writing by both sides, after the case was closed, the trial judge insisted that (tt1503):

> "The second count remains, and that charges that the defendant, Albert Mintzer, between April 20,1961 and December 31, 1962, while acting as a trustee appointed by an instrument and with the intent to deprive and defraud others of property and of the use and benefit thereof, secreted, withheld or otherwise appropriated to his own use or to the use of someone other than the true owners and persons entitled thereto, again the persons of whom you have spoken, in violation, I take it, of Section 1302 of the Penal Law"

On his summation to the jury, the prosecutor stated (tt.1576):

> "The indictment as it now stands is limited to three counts. His Honor will tell you that.
>
> One count is that he diverted or appropriated or secreted or withheld from the true owners, monies, that is, the subscribers of the 30th Street stock, as trustee under a written instrument. There is an intent involved in that crime, and His Honor will instruct you about that."

Much of the prosecutor's summation was devoted to the evidence adduced in support of count 2. A casual examination establishes that the prosecutor's summation was quite emphatic and inflammatory on this count 2. (tt.1576-1615)

The next day, June 11, 1964, at 11:30 in the forenoon, the trial judge commenced his charge to the jury which consumed all of the morning and continued in the afternoon for a substantial part thereof.

The trial judges charge to the jury commences at page 1617 of the trial transcript and ends at page 1741. ~~This~~ A total of 124 pages.

After the trial judge was well into his charge, he instructed the jury, without any previous notice to petitioner, that he intended so to do, as follows:(1682-1683):

> "I may tell you now at this stage that I have eliminated by my rulings on the law the first count of the indictment and the fourth count of the indictment. I shall tell you more about that later. And I shall tell you now, too, that in submitting the case to you I shall withhold from you the second count of the indictment so that you will have for consideration the third count, which summarized the charges of larceny by false pretense,--I will refer to that later-- and the fifth count, which charges a separate crime in failing to file the required annual report."

About 30 pages later in the trial transcript of the charge (tt.1714), the trial judge repeated "I have eliminated the first and fourth counts, and I shall not submit to you the second count."

At no time did the trial judge comply with Section 410 of the New York State Code of Criminal Procedure which provides that "if, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction of one or more of the crimes in the indictment or

information, it may advise the jury to acquit the defendant thereof and they must follow the advice".

Instead of complying with said state law, the trial judge instructed the Jury(1714):

> "What I have done and the reason for doing it is of no concern to you. It is purely a matter of law, which is within my province as the judge of the law. You may not even speculate as to why it was done, nor may you draw any inference as to the guilt or innocence of the defendant because of that as bearing on the other counts in the indictment. . . . . ."

In denying petitioner habeas relief, Judge Gurfein found (A8):

> "This claim of prejudice is cast in the most general terms and is unsupported by any authority, even though petitioner is a former attorney. It is undoubted that a trial court may dismiss particular counts and allow the jury to consider evidence pertaining the dismissed counts (citing United v. O'Brien, 441 F. 2d 260 (5th Circuit 1971)).

Petitioner respectfully urges that this finding is erroneous, as a matter of law, in that the state trial record, does establish that the conduct of the trial judge, as hereinbefore delineated, massively prejudiced the jury against petitioner with the result that the jury found him guilty on counts 3 and 5 of the indictment. That, in so doing, the jury was infected with the evidence adduced in support of the withdrawn conversion count 2 (and the prosecutor's inflammatory summation based thereon) cannot, as a matter of law, be gainsaid.

Petitioner contends that even if it be assumed, arguendo only, that actual prejudice was not established, the circumstances surrounding the withdrawal from the jury of the

of the conversion count 2, as aforesaid, were of such character "which must be presumed to have prejudiced defendant". This quotation comes from Duncan v. Carter, 299 F. 2d 179 (1962, C.A. California) wherein the test, as to due process violation, was stated to be at page 184:

> "Contention that trial court occurrence was of such nature as to deprive criminal defendant of due process presents question whether occurrence was of a kind which must be presumed to have prejudiced defendant despite instructions and other action to cure error (emphasis added).

This test of a due process violation is underlined, at bar, because the trial judge made no attempt to "cure" his unusual prejudicial conduct, as aforesaid, if, in fact, it was capable of being curing. On this matter, the decision of this Court in United States v. Wolfson, 437 F. 2d 862, is very pertinent.

In Wolfson, supra, the district court dismissed a fraud count against one of the defendants after four weeks trial thereon. On this aspect of said trial, this Court held: (at page 869):

> "Merely to instruct the jury at the end of the case and in the charge to disregard four weeks of proof directed to stock fraud was probably an exercise in futility exemplified by (citing authority). In short, no matter what instructions were given, it is more than doubtful that the minds of the jury could be wiped as clean as a blackboard slate. . . . . Our developed concepts of a fair trial call for serious consideration of the likelihood of prejudice". (emphasis added)

United States v. O'Brien, supra, hereinafter referred to as "O'Brien", cited below by Judge Gurfein, is distinguishly and has no application at bar. It was cited in support of Judge Gurfein's observation "that a trial court may dismiss particular counts and allow the jury to consider evidence pertaining the dismissed counts" (p.13,supra).

Petitioner has not been able to gain access to the record on appeal in O'Brien. However, he has examined the brief on appeal of the Government wherein the O'Brien record is reviewed.

It appears that two defendants, O'Brien and Miller, were charged in a four-count indictment with knowingly passing, uttering and publishing, with intent to defraud, certain forged and altered U. S. postal money orders.

At the conclusion of the Government's case, on motion of O'Brien, the district court dismissed two counts against him and, on motion of Miller, three counts were dismissed.

On appeal,both defendants contended that "the court erred in allowing the jury to consider the Government's evidence concerning the counts that the court dismissed at the close of the Government's case".

The Fifth Circuit affirmed the convictions of both defendants, on the counts not dismissed, holding that "the court did not err, in the circumstances of this case, in permitting the jury to consider the Government's evidence pertaining to the dismissed counts"(emphasis addied)

The "circumstances" at bar are quite different, than those in O'Brien, in the following respects:

1. At bar, the trial judge denied motions to dismiss the conversion of trust funds count 2, on the People's case and on the whole case whereas, in O'Brien, the motions to dismiss were granted on the Government's case as aforesaid;

2. At bar, petitioner received no previous notice, prior to summations, that the trial judge intended to withdraw count 2 during his charge to the jury. As a matter of fact, the trial judge stated, just before the summations, as hereinbefore indicated and now repeated (tt.1443) "By the same token, the major count, as I see it, is 1302 (of the Penal Law) and that is mishandling trust funds. . . .". Whereas in O'Brien, the defense attorneys had the opportunity, in their summations to the jury, to make extended reference to the dismissals and the evidence adduced by the Government in suppoert of the counts dismissed.

The brief of the Government, in O'Brien, at page 13 states:

> "Counsel for defendant, O'Brien, in his closing argument provided a further safeguard for his client in ensuring that the jury no longer gave consideration or placed O'Brien in jeopardy regarding the dismissed counts when he said (T-2 99):
>
> 'Just because a charge is made and brought into Court by the Government, whether it be by Grand Jury indictment or whatever means it may be brought, doesn't make it sacrosanct and doesn't make it true. . . . . .' "

No such opportunity was offered petitioner, at bar, because he had been emphatically told, by the trial judge, on many occassions cited above, that the conversion count 2 was the "major count" to be submitted to the jury on which the prosecutor had a "field day" in his summation to the jury.

3. As appears at page 12 of the Government's brief in O'Brien, the trial judge did describe to the jury the nature of the counts he was dismissing. At bar, however, the trial judge, in withdrawing count 2 from the jury, surrounded such withdrawal with mystery and instructed the jury, as shown hereinbefore and now partially repeated, "You may not even speculate why it was done"(tt.1714). It does not appear that the jury even knew what count 2 was all about;

4. At page 14 of its appeal brief in O'Brien, the Government stated "It could be argued, by the Government, that the jury did not further consider the evidence pertaining to the dismissed counts, for any purpose whatsoever, after the Court and counsel for defendants had placed so much stress on the fact of the removal of the dismissed counts from further consideration of the jury".

However, at bar, must unusual instuctions were given to the jury pertaining to the law involving larceny by embezzlement by a trustee or bailee which is set forth in Section 1290, subd.2, of the New York State Penal Law, which involves money that

> "2. The accused in the first instance obtained possession of, or title to, such prop-

erty lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or to the use of any person not entitled to the use and benefit of such property".

A charge of larceny by false pretense (count 3 on which petitioner was convicted), embraced in subdivision 1 of section 1290 of the Penal Law, cannot, as a matter of state law, be established by proof concerning the type of larceny by a trustee (not appointed by a written instrument, as required under section 1302 of the Penal Law) or a bailee, embraced in subdivision 2 of section 1290 with which petitioner was not charged in any count of the indictment.(People v. Dumar, 106 N.Y. 502; People v. Ginsberg, 274 App.Div. 1007).

Notwithstanding that, on two occasions, the trial judge advised the jury during his charge that the conversion count 2 was not being submitted to it for consideration (1683 and 1714 of the trial transcript), the trial judge, as appears at pages 1721-1723 of the transcript, after he had withdrawn count 2, charged the jury at considerable length, on the law pertaining to larceny by a trustee or bailee, under 1290, subd.2, above quoted, upon which, let it be again repeated, petitioner was not charged.

This very prejudicial aspect of the trial judge's charge is set forth, at length, at pages 67 to 68, in the state Court of Appeals 79 page brief, of petitioner of which a copy was furnished, below, to Judge Gurfein and of which copies will be furnished to this Honorable Court, as aforesaid.

By charging the jury on the law pertaining to Larceny by a trustee or bailee, as a foresaid, not only did the trial judge fail to describe to the jury the nature and substance of count 2 which was withdrawn from the jury, but, also, the trial judge committed an additional impropriety that "clearly show a denial of due process such as to deprive (petitioner) of fundamental fairness" (Murphy v. Beto, 416 F. 2d 98, C.A. Texas).

Point Two

PETITIONER'S STATE COURT CONVICTION AND IMPRISONMENT, UNDER THE CIRCUMSTANCES DELINEATED HEREIN, CONSTITUTE A MANIFEST MISCARRIAGE OF JUSTICE JUSTIFYING HABEAS CORPUS RELIEF.

A state Court of Appeals decision pertinent at bar is People v. Robinson, 273 N.Y. 438, where it was stated:

> "An accused is intitled to a fair trial. Our rules of law are intended to guarantee to him that right and to afford him protection against its invasion.
>
> "Admonition to disregard evidence which is stricken out is easy to give and hard to follow.
>
> "We have said recently: 'We must give to any defendant the right to be tried for the crime with which he is charged . . . .uninfluenced by irrelevant facts and circumstances which tend to prejudice or mislead the jury. Issues must be left clear, not smothered or in a haze'" (Emphasis Added).

CONCLUSION

Petitioner respectfully prays for relief as follows:

1. The orders of Hon. Murry I. Gurfein, district judge, dated, respectively, June 13, 1972, August 7, 1972 and August 15, 1972, should be reversed;

2. Petitioner's application for habeas corpus relief should be granted;

3. The judgment of the Supreme Court of the State of New York, dated July 13th,1964, convicting petitioner of the felony crime of Grand Larceny, First Degree, by False Pretense, and the misdemeanor crime of Failing to File an Annual Report of Real Estate Syndication, should be, in all respects, vacated;

4. A new trial, in the state Supreme Court, of counts 3 and 5 of the indictment should be directed; and

5. Such other and further relief, as to this Court may appear just, under the circumstances.

Respectfully submitted,

ALBERT MINTZER
Petitioner-Appellant Pro Se

Dated: May 28th, 1975

INDEX OF APPENDIX

Docket Entries

Mar.14,1966	Filed petition for writ of habeas corpus.
Apr.28,1972	Filed OPINION #38452 - Re: Petition for writ of H/C -- "Because the respondents have never been served by the petitioner, the respondent NY State is hereby irdered to show cause within 20 days why the writ should not be granted.28 U.S.C.2243. When the respondent's papers are served & filed, the petitioner will have 20 days thereafter in which to serve and file a reply to the same. It is so ordered. Gurfein J. m/n
Jun.14,1972	Filed Affdvt of Mortimer Sattler, atty for respondent State of NY in opposition to petitioner's application for writ of H/C.
Jun.14,1972	Filed letter from Pltff to Gurfein J. dated May 1,1972.
Jun.14,1972	Filed letter from Pltff to Gurfein J. dated Apr. 25,1972.
Jun.14,1972	Filed letter from Pltff to Gurfein J. dated May 16,1972.
Jun.14,1972	Filed Brief of Albert Mintzer.
Jun.14,1972	Filed OPINION #38562 by Gurfein J. ---Re: application for writ of H/C.---"Accordingly, this claim must be dismissed for failure to exhaust his state remedies. Mintzer's application for a writ of H/C, as amended, is in all respects denied. It is so ordered." Gurfein J. m/n
Aug. 7,1972	Filed OPINION #38720. Gurfein,J. The motion for reargument is denied. It is so ordered (mailed notice).
Aug.16,1972	Filed Petitioner's application for certificate of probable cause.
Aug.16,1972	Filed Memorandum and Order that a certificate of probable cause is granted. (m/n) GURFEIN,J.
August 21,1972	Filed Notice of Appeal to the U.S.C.A. from order dated August 15, 1972
4/21/75	Filed application for reargument

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

In The Matter of the Application of

ALBERT MINTZER,

Petitioner,

for a Writ of Habeas Corpus

66 Civ.724

-against-

STATE OF NEW YORK and PUBLIC SERVICE MUTUAL INSURANCE COMPANY,

Respondents.

- X

APPEARANCES

ALBERT MINTZER
Petitioner Pro Se

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Respondents
By: Mortimer Sattler,
Of Counsel
80 Centre Street
New York, New York.

Gurfein, D. J.

Albert Mintzer, petitioner pro se on this habeas corpus application under U.S.C. #2241, is presently on parole resulting from a conviction of July 13, 1964 on a count of grand larceny in the first degree by false pretenses (New York Penal Law #1290). After trial by jury before Justice Saypol in the Supreme Court, New York County, Mintzer received a sentence of five to ten years on that count. In the same trial Mintzer was also convicted on a count of failure to file an annual report required of real estate syndicates (New York

General Business Law # # 353-e-(8), 359-g) on which he received a one year suspended sentence. Three other counts were dismissed. On Semptember 22, 1969, after serving nearly 3-½ years, Mintzer was paroled.[1/]

This petition for a writ of habeas corpus recently came before me under the new individual assignement system. Although the case had apparently lain dormant since 1966, Mintzer advised the Court that he still wished to pursue relief. Accordingly, I reactivated the action by an order to show cause against New York State dated April 27,1972.[2/]

The instant application for a writ was filed in this Court on March 14,1966 (66 Civ.724). The contemporaneous request for an order to show cause was, according to the present recollection of the petitioner,[3/] denied by Judge Murphy of this Court. In any event, another application for a writ was later filed in this Court (66 Civ, 3476), which was denied by Judge Bryan in an unprinted memorandum opinion of May 15,1967; and his denial was affirmed by the Court of Appeals, United States ex rel. Mintzer v. Dros, 403 F. 2d 42 (1967), cert. denied, #() U.S. 1044 (1968). We have been unable to find a copy of Judge Murphy's order (if in fact he made one), but we shall not entertain anew the points raised before Judge Bryan which were the subject of affirmance on appeal.

While conventional of res judicata do not apply to habeas corpus proceedings, there are "principles of finality which may bar a subsequent habeas ...application raising the same

ground decided before, or bringing a claim . . . unnecessarily separated from earlier claims." Developements in the Law -- Federal Habeas Corpus, 83 Harv.L. Rev. 1038, 1148 (1970); see U.S.C. #2244(b). Here, Mintzer has received extensive review in the state courts and, more importantly for our purpuses, careful consideration by this Court of a subsequently-filed habeas petition.

Mintzer contended, inter alia, before Judge Bryan: (1) that the evidence only established larceny by promise, which was not then a crome in New York; (2) that the General Business Law #352-e(8) was unconsitutionally vague for failing to define "syndicate;" and (3) that he had not received a fair trial because of the manner in which it was conducted by the trial judge. Each of the grounds was found not sufficient for federal habeas corpus relief.

Petitioner asserts, however, that in spite of the fact that the instant petition was filed earlier than the petition upon which Judge Bryan passed, there are matters herein which Judge Bryan did not pass upon. The court has examined the instant petition and finds little of substance in it which was not considered by Judge Bryan and affirmed by the Court of Appeals. I find that "the ends of justice would not be served by reaching the merits of (this) subsequent application," Sanders v. United States, 373 U.S. 1, 15 (1963, at least with regard to the previously raised allegations.[4/]

One point not considered by Judge Bryan was Mintzer's

claim that the count of grand larceny by false pretenses "cannot be sustained in any event, as a matter of New York State Law, by reason of the fact that Section 352-h of the General Business Law makes the same crime a misdemeanor if it involves monies derived from the sale of real estate securities". However, this claim was dealt with by Justice Helman in an earlier state habeas proceeding brought by Mintzer. There it was held:

> "It is petitioner's claim that, at best, he should have been convicted only under count 4, charging him with violation of section 352-h. The contention is without merit. That the prosecution of defendant had its genesis in an offering of securities qualified under section 352-e-1 of the General Business Law, did not, as urged by defendant, close the door to a prosecution under section 1290 for grand larceny, if the activities of the defendant brought his conduct within the scope of that statute. Principles of statutory construction which interpret general statutes as excluding from their operation activities embraced by later enacted 'specific' statutes, do not apply here, no such intention having been expressed by the Legislature. The broad provisions of the larceny statutes include many instances where conduct violative of other laws comes within the scope of our Penal Laws".

Justice Helman's reasoning is adopted. Alternatively, this can be viewed as a matter of state law beyond the purview of federal habeas corpus.

One other new point was raised by Mintzer in his letter of April 25, 1972:[6] he argues that his conviction of grand larceny by false pretenses was unconstitutional because an overwhelming bulk of the evidence at trial was introduced in support of a count alleging conversion of trust funds, which count was ultimately withdrawn by the trial court from the jury's consideration. However, the petitioner himself, in his

brief annexed to the letter of May 16,1972, argues:

> "I did not raise this question in the state courts nor in my habeas proceeding passed on by Judge Bryan of this Court".

Accordingly, this claim must be dismissed for failure to exhaust his state remedies. 28 U.S.C. #2254.

Mintzer's application for a writ of habeas corpus, as amended, is in all respects denied.

It is so ordered.

Dated: June 13,1972.

c/s M.J. Gurfein
U.S.D.J.

FOOTNOTES

1/ The conviction of Mintzer has been the subject of extensive judicial review. First, there was a direct appeal resulting in affirmance reported in 23 App. Div.2d 821 (1st Dept. 1965), aff'd, 16 N.Y. 2d 1051 (1965),remittitur amended, 17 N.Y. 2d 491 (1966), motion for reargument denied, 17 N.Y. 2d 549 (1966), cert. denied, 384 U.S. 933, 949 (1966), motion for reargument denied, 22 N.Y. 2d 828 (1968)

The United States Supreme Court denied a motion for leave to file a petition for a writ of habeas corpus,Mintzer v. Warden, 384 U.S. 949 (1966). On June 24, 1966 the Supreme Court, New York County, denied a coram nobis application; and then later the same Court denied habeas corpus relief, Mintzer v. Dross, N.Y.L.J. August 26, 1966 at 8-9 (Helman, J.).

Finally, after turning to this Court for a remedy, as described in the text, state habeas corpus relief was denied again, this time by the Supreme Court, Westchester County (Sirignano, J.). That denial was affirmed in People ex rel. Mintzer v. Deegan, 32 App. Div. 2d 891 (2d Dept. 1969), leave to appeal denied, 25 N.Y. 2d 738 (1969), cert. denied, 396 U. S. 994 (1969)

2/ The Court now has before it the original petition and trial transcript; the State's responding papers dated May 10, 1972; and letters, with enclosures, from Mintzer dated April 25, May 1 and May 16, 1972.

3/ Expressed in his letter of May 1, 1972.

4/ The Court of Appeals rejected petitioner's attacks on his conviction for failure to file an annual report by noting:

> "Since appellant was given a suspended sentence of one year on this count, and that year expired when the decision was handed down, federal habeas corpus is not available to challenge it" 403 F.2d43

Mintzer now contends that this holding was rendered erroneous by the later decision in Carafas v. LaVallee, 391 U.S. 234 (1968). That case did establish that once federal habeas corpus jurisdiction attaches, it is not defeated even by the unconditional release of the prisoner prior to the termination of the habeas proceedings. However, here, since execution of the sentence was suspended, Mintzer was never in sufficient custody for habeas jurisdiction to attach. Thus, the conclusion of the Court of Appeals remains valid. See Developments in the Law, supra, 83 Harv. L. Rev. at 1077-78

5/ See note 1 supra

6/ In his recent letters to the Court, see note 2 supra, he seeks to amend his petitinn in various ways. In view of the amount of time which has expired since his petition was filed and in light of the Court's desire to consider any valid claim, the Court grants leave to amend the original petition as requested in those letters.

The only additional question raised by those letters which merits discussion is his incorporation in the instant petition of the claims made in his unsuccessful state habeas petition brought before Justice Sirignano, see note 1 supra. This was done by merely summarizing the claims of that petition, without any argument directed to the question of how the state court erred in its denial. At any rate, two of these three claims are clearly issues of state law not here reviewable. The third alleges denial of due process without any explanatory information; this is a meaningless assertion of a conclusion of law which will not sustain this petition.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

38,720

SAME CAPTION

Pro Se 66 Civ.724

- - - - - - - - - - - - - - - - - - - -x

APPEARANCES

ALBERT MINTZER
Petitioner Pro Se

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Respondents
New York, New York
By: Mortimer Sattler
Of Counsel

GURFEIN, D. J.

This is a motion ~~mortgage~~ for reargument subsequent to my decision of June 13, 1972 denying the petition for a writ of habeas corpus. Several points raised by petitioner on this motion warrant elaboration.

First, in my decision I dismissed one claim for failure to exhaust state remedies, because petitioner himself alleged the claim was a new one and because the burden of showing exhaustion is on the petitioner. Now Mintzer argues that his allegation of newness "was inadvertently made," and that this contention was in fact presented, albeit unsuccessfully, in his second state habeas corpus proceeding before Justice Sirignano. Since the state has declined to respond to this motion and its supporting papers and since I have had the opportunity to investigate that proceeding, I now accept Mintzer's contention that he has adequately exhausted his

state remedies.

The claim in question is that his conviction of grand larceny by false pretenses was offensive to due process because the overwhelming bulk of the evidence at trial was introduced in support of a count alleging conversion of trust funds(and the prosecutor delivered an inflammatory summation with respect to that count), while that count was ultimately withdrawn by the trial court from the jury's consideration. It is alleged that the count was withdrawn during the charge to the jury, even though earlier motions by the defendant to dismiss that count had been denied.

This claim of prejudice is cast in the most general terms and is unsupported by any authority, even though the petitioner is a former attorney. It is undoubted that a trial court may dismiss particular counts and allow the jury to consider evidence pertaining to the dismissed counts. United States v. O'Brien, 441 F. 2d 260 (5 Cir.1971). While on occasion prejudice may result from such a practice, there is nothing in the record before me to suggest that the trial judge's power was abused or that there was any denial of fundamental fairness in Mintzer's case. Cf. United States ex rel.Mintzer V. Dros, 403 F. 2d 42, 43 (2 Cir.1967), cert. denied, 390 U.S. 1044 (1968); United States ex rel, Castillo v. Fay, 350 F.2d 400 (2 Cir. 1965), cert. denied, 382 U.S. 1019 (1966). The claim is, therefore, dismissed.

Second, the petitioner argues that, in relying on Judge

Bryan's earlier denial of a Mintzer petition, I overlooked his contention that Judge Bryan had not adversely"adjudicated" the claim that the record was barren of any evidence to support the conviction. However, it is uncontested that Mintzer raised this contention in his petition before Judge Bryan, that Judge Bryan denied the petition, that the Court of Appeals found the "district court carefully considered" the contention that "there was no evidence to support the conviction," and finally that the Court of Appeals concluded that there was "no adequate reason. . .for disturbing that court's conclusions." United States ex rel. Mintzer v. Dros, supra, 403 F. 2d at 43.

Given this context, petitioner's argument that Judge Bryan did not adversely adjudicate this ground of relief distills to the position that claims not expressly discussed in an opinion are not adversely "adjudicated". This simply is not so. While an affirmance by an equally divided court or a denial of certiorari is not an adjudication, United States ex rel Radich v. Criminal Court, Slip Op. 2823 at 2831 (2 Cir April 26,1972), "the fact that no opinion is written is obviously unimportant," Id. at 2838 (Mulligan, J. dissenting). Cf. Duncan v. Carter, 299 F. 2d 179 (9 Cir.), cert denied, 370 U.S. 952 (1962); Developments in the Law--Federal Habeas Corpus, 83 Hav. L. Rev. 1038,1152 (1970).

Third, the other contentions made by Mintzer on this motion are not found to be persuasive.

Therefore, the motion for reargument is denied.

It is so ordered.

Dated: August 7, 1972.

c/s M. J. Gurfein
U.S.D.J.

(This Space Intentionally Left Blank)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

Filed August 16,1972

SAME CAPTION

Pro Se 66 Civ. 724

- - - - - - - - - - - - - - - - - - x

GUTFEIN, D. J.

Mr. Mintzer now asks that, by amendment, the Court first grant his motion for reargument, which was denied on August 7, 1972, and then adhere to its original decision denying habeas relief. This procedure is said to be necessary to permit appeal from that order of August 7, k972; Mr. Mintzer argues there can be no appeal from an order denying a motion for reargument. Without deciding whether his contention is correct but recognizing that new matters were dealt with in the August 7 order, I now do amend that order so as to indicate that the reargument application was granted, but that my original decision to deny in all respects the application for a writ of habeas corpus corpus was then adhered to.

A certificate of probable cause is granted.

It is so ordered.

c/s M. J. GURFEIN
U.S.D.J.

Dated: August 15th,1972.